No. 12,023

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

and

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The opinion of the district court (R. 461-504) is reported at 72 F. Supp. 903.

JURISDICTION

This is an appeal from a judgment entered November 5, 1947 (R. 504-507), on consolidated trial of thirteen proceedings in eminent domain brought by the United States. The Honolulu Plantation Company filed its

notice of appeal February 3, 1948 (R. 509). Jurisdiction of the district court was invoked under section 201 of the Act of March 27, 1942, 56 Stat. 176, 177 (R. 11, 37, 71, 91, 110, 195, 201, 226, 298, 324, 355, 372, 398). Jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that negotiations between appellant and the Trustees of the Damon Estate, owner of 595.01 acres of the land condemned by the United States, had not given appellant such an interest in the 595.01 acres as to entitle it to recover severance damages for asserted diminution in value of its remaining property due to the condemnation.

2. Whether the district court erred in refusing to award appellant $595,010 severance damages on account of condemnation by the United States of 595.01 acres of land owned by the Damon Estate.

STATEMENT

Between June 21, 1944, and December 6, 1945, the United States filed thirteen proceedings, subsequently consolidated (R. 5-9), to condemn a total of 1,896.184 acres of land, including 1,087.59 of the 4,300 acres of cane land embraced in the plantation of appellant Honolulu Plantation Company (R. 552, 586, 1300). Appellant owned in fee 2.912 acres of the land taken (R. 638-639, 1537). The remainder was occupied by it under various leases or other arrangements. Appellant's only claim on account of the taking of land occupied but not owned by it is a claim for severance damages for asserted resulting diminution in the value of the untaken remainder of its plantation. The trial court allowed severance damages based on the taking of 440.175 acres (R. 504), and the United States has

appealed from that judgment (R. 508). The Honolulu Plantation Company appeals from the refusal of the trial court to allow severance damages on account of the taking of an additional 595.01 acres occupied by appellant and owned by the Damon Estate (R. 509).

This land was part of 1,451.66 acres leased to appellant by the Trustees of the Damon Estate, under date of June 27, 1927, for a term of fifteen years beginning January 1, 1929, and ending December 31, 1943 (R. 1516-1533). That lease expired before the first of the present condemnation suits was begun on June 21, 1944 (R. 10-23). However, before its expiration there was an exchange of letters between the Trustees and C. Brewer & Co., appellant's agent (R. 1098-1099), looking toward execution of a new lease; and appellant relies on those letters as in themselves constituting either a new lease or a binding contract to make a lease. The first letter was from the Trustees to C. Brewer & Co. on October 18, 1940 (Ex. 9K, R. 1513-1515):

> The Trustees of the S. M. Damon Estate are willing to lease to the Honolulu Plantation Company for a term of ten years from the expiration of the present lease, or until December 31, 1953, unless there is an earlier determination of the Trust, the areas as set forth under the terms and conditions specified below:
>
> Land to be leased comprising fields now in cane mauka [on the landward side] of Kamehameha Highway and makai [on the seaward side] of the Highway fields 92 to 94 inclusive. (We understand fields 95 and 96 are going to be taken over by the U. S. Army.) Lease of fields 91 and 107 not to be renewed and these lands to revert to the Estate at the termination of the present lease on December 31, 1943. Fields 97-A and 97-B, known as the "Gore Lot," to be surrendered to the Estate without cost when the present cane growing on said land is harvested.

The minimum rental to be $15.00 per acre for lands occupied for plantation purposes. Said rental to increase at the rate of 20¢ per acre per annum for any increase of $1.00 in the average price of 96° New York raws about [above] $50.00, and proportionately for any fraction of an increase of $1.00, said increase, however, to cease when the price of 96° raws exceeds $100.00.

The Plantation to pay the property taxes.

If the present Sugar Act is to continue in its present or a similar form, 75% of the Federal payments to be added to the New York basis price to determine the average price of 96° raw sugars which fixes the rental value basis.

All areas not in sugar cane and not used for ditches or railroads may be withdrawn by the Estate's giving sixty days' notice, without penalty to the Estate, including any reduction in rent.

The Damon Estate to have an easement over the roads so as to give proper ingress and egress to the lands mauka of fields 82 to 89, also to have the privilege of laying water pipes along such roads at such times as the fields have just been harvested in order not to interfere with plantation operations.

If these terms are agreeable a formal lease can then be drawn up.

To this, P. E. Spalding, vice-president of C. Brewer & Co., replied on October 21, 1940 (Ex. 9K, R. 1515-1516):

We have for acknowledgment your letter of October 18, 1940 containing an offer to lease to the Honolulu Plantation Company certain lands of the Estate of S. M. Damon for a period of ten years commencing January 1, 1944 and terminating December 31, 1953 and under certain conditions.

The terms of your offer are acceptable to Honolulu Plantation Company. We understand that unless Fields 95 and 96, makai of Kamehameha Highway, are taken over by some Federal authority before the expiration of the current lease, they will

be included in the lands to be leased to Honolulu Plantation Company.

We will prepare a tentative form of lease for submission to you.

Following that exchange, which forms the basis for appellant's contention, C. Brewer & Co. wrote to the Trustees on November 29, 1940 (Ex. A, R. 1567-1568):

> Proposed New Lease of Moanalua Lands to Honolulu Plantation Company
>
> In further reply to your favor of October 18, 1940, we now indicate that a tentative form of lease has been drawn up by us and same is submitted to you, herewith.
>
> No effort has been made to describe the areas to be leased as these will have to be prepared by some surveyor who has complete data, but said description should, of course, include the fields mentioned in your favor and certain adjacent land that is now held under the existing lease, except the areas recently condemned.
>
> It may be well to fix the aggregate minimum rental figure with definiteness when the form of lease is finally accepted.
>
> We will be glad to prepare the form of new lease in a permanent way if you will furnish us with a description of the land to be demised and will also indicate your approval of the form of said new lease as submitted, or state what changes you desire to have made therein.

The tentative form of lease (Ex. B, R. 1568-1577) followed in general the terms of the lease of June 27, 1927 (R. 1516-1533), with some modifications to conform to the Trustees' letter of October 18, 1940. It also contained provisions not found in either. Thus, it provided for a holdover rental of $15.00 per acre per annum (R. 1570), which was neither the former holdover rate of $23.50 (R. 1523) nor the new regular rental of $15.00

plus contingent increases (R. 1571). The Trustees' letter called for rental to be computed according to the number of acres "occupied for plantation purposes" (R. 1514), but the tentative draft confined its rental basis to land "cultivated in cane" (R. 1571).[1] The tentative draft introduced a provision giving the lessee up to 30 days beyond the end of the calendar year for payment of increases in rent above the yearly minimum of $15.00 per acre (R. 1572). It also added a new qualification to the lessee's obligation to pay taxes and assessments, that the lessor should not, without consent of the lessee, take action to create liability on the lessee for permanent benefits; and it provided that the lessee could withdraw from the lease as to any land on which the taxes might equal or exceed the rent (R. 1574).

After another but immaterial exchange between the parties (Ex. C, R. 1578-1579; Ex. D, R. 1580), the Trustees on August 15, 1941, wrote to C. Brewer & Co. as follows (Ex. E, R. 1581-1583):

> Due to our inability now to lease to the Honolulu Plantation Company certain areas at Moanalua, and your inability to deliver certain areas as a result of the recent federal condemnation proceedings, the Trustees under the Will of Samuel M. Damon now propose to lease for a period of ten years from the expiration of the present lease, or until December 31, 1953, unless there is an earlier determination of the Trust, the following areas, subject to the following terms, conditions and rights of withdrawal:
>
> The land to be leased to comprise fields 82-89 inclusive, except a strip approximately 250 feet deep just mauka of Kamehameha Highway along the

---

[1] The lease of June 27, 1927, was of 1,451.66 acres, of which only 1,223.91 acres were cane land (R. 1526). According to H. P. Ex. 6 (R. 1300-1303), the present suit took 658.317 acres of Damon Estate land occupied by appellant, of which only 595.01 acres were cane land.

entire makai end of field 83, which shall be surrendered at once from the present lease, the plantation railroad to be moved mauka of this strip; excepting also a portion of fields 88 and 89 to a point opposite "E" Road; the lessors to have the right to withdraw, upon eighteen months' written notice, the remaining area of field 83 prior to December 31, 1945; fields 86, 88 and the remaining portion of 89 up to a point opposite John Rodgers Airport Road, prior to December 31, 1948; and all of field 84 mauka of the ditch, prior to December 31, 1950.

It will be noted that no land makai of Kamehameha Highway is to be included in the proposed new lease.

The minimum rental to be 15 per acre for lands occupied for plantation purposes. Said rental to increase at the rate of 20¢ per acre per annum for for any increase of $1.00 in the average price of 96° New York raws above $50, and proportionately for any fraction of an increase of $1.00, said increase, however, to cease when the price of 96° raws exceeds $100. * * * [2]

The lease to include a condemnation clause, hunting and trespassing clause, and strip and waste clause, in form satisfactory to us, together with such other provisions as shall be deemed proper.

We do not concur in some of the provisions which were contained in your former tentative draft, namely, the provision that in case the lessee continues to occupy after the termination of the lease in order to harvest crops the rent be at the fixed rate of $15 per acre, instead of at the rate hereinabove mentioned; and the clause on page 5 giving the lessee the option to withdraw certain areas. We think that the covenant on page 6 with reference to cultivation and rights of way would be unnecessary. The surrender clause at the bottom of page 6 should provide that in case buildings

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[2] Here were repeated without change certain terms proposed by the Trustees' letter of October 18, 1940 (pp. 3-4, *supra*).

> shall be removed the lessee shall restore the surface of the land to its original condition.
>
> If these terms are agreeable, please signify acceptance in writing at your earliest convenience, and we will submit a formal draft of lease for your acceptance.

C. Brewer & Co. rejected the proposal (Ex. 18, R. 1541-1542). It said:

> Your specific offer of October 18, 1940 and our unconditional acceptance of October 21, 1940 constituted a binding agreement which could only be altered by mutual consent. You are therefore advised that your supplementary offer of August 15, 1941 is rejected and that Honolulu Plantation Company will adhere to its full rights as established by the existing agreement.[3]

After its lease expired on December 31, 1943, appellant continued until 1946 to occupy so much of the Damon Estate property as was not taken by federal condemnations (see R. 498), being billed for and paying rent at the rate provided by the Trustees' letter of October 18, 1940 (R. 1201-1202). The first of the present suits was filed June 21, 1944 (R. 10-23), and that is to be deemed the date of taking for all thirteen suits (R. 459-460, 462, 499).

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[3] On September 16 and again on November 11, 1943, Charles H. Merriam, writing on behalf of C. Brewer & Co. in answer to inquiries from the Navy Department regarding leasing some of these lands, suggested that the Department should deal with the Trustees of the Damon Estate. His second letter explained that "Honolulu Plantation Company's tenancy expires on these areas on December 31, 1943" (Govt. Ex. 9 for identification, see R. 1126, admitted at R. 1261 as Ex. H, R. 1588-1589; Govt. Ex. 8 for identification, see R. 1122, admitted at R. 1261 as Ex. G, R. 1586-1587). Mr. Spalding testified that those letters were written without his knowledge, and that Mr. Merriam was failing mentally at the time, although the company attempted to conceal that fact from the public and kept him in his position as manager of its real estate department until the summer of 1944 (R. 1122-1128, 1183-1186, 1205-1207).

On the foregoing facts, the district court held that the correspondence between appellant's agent and the Trustees of the Damon Estate was not intended by them as a new lease; that after December 31, 1943, appellant was at best a tenant from year to year with a right to secure a lease; and that at the date of taking appellant did not have such an interest in the lands of the Damon Estate as to support its claim for severance damages (R. 499-503).

SUMMARY OF ARGUMENT

1. Appellant Honolulu Plantation Company did not have a leasehold estate in the 595.01 acres at the time of the taking. Whether correspondence, in itself, constitutes a lease depends on the intent of the parties. Here, the language used by appellant and the Trustees of the Damon Estate, their expressed intent to draw up a formal lease, their subsequent conduct and the surrounding circumstances all indicate that they did not intend their correspondence to constitute a lease.

2. Appellant did not have a binding contract to receive a lease from the Trustees of the Damon Estate. Their correspondence was no more than negotiation, and in any event appellant's letter relied on as an acceptance did not conform to the Trustees' proposal.

3. Even if appellant had a legally binding contract for a lease, its silence as to material terms of the proposed lease made it too indefinite to be capable of specific enforcement. Consequently, appellant had no equitable estate in the 595.01 acres, and as to it the condemnation was at most a noncompensable frustration of a contract and not a compensable taking of property.

4. Whatever appellant's rights in the 595.01 acres might ultimately have been determined to be, at the time of the taking those rights were so dubious that they did not enhance the market value of appellant's re-

maining property. Therefore the condemnation of the 595.01 acres did not diminish the market value of appellant's remaining property, and appellant is not entitled to severance damages.

ARGUMENT

I

Appellant Did Not Have a Lease of the 595.01 Acres Owned by the Damon Estate

Appellant asserts (Br. 9-13) that the letter of October 18, 1940, from the Trustees of the Damon Estate (pp. 3-4, *supra*), and the reply of C. Brewer & Co., appellant's agent, on October 21, 1940 (pp. 4-5, *supra*), amounted to a lease to appellant, for ten years beginning January 1, 1944, covering the lands here in question. The district court correctly held to the contrary (R. 499-502).

It is the intent of the parties which determines whether a particular instrument or series of instruments is a lease. An agreement is a lease if it "leaves nothing to be done and gives the lessee an immediate right of possession". 3 Thompson, Real Property (1940) 293; *Larrisch* v. *Schaefer,* 6 Hawaii 140, 142-143 (1875), quoting 1 Washburn, Real Property, 300 and 4 Kent, Commentaries, 108. However, "If the contracting parties manifest an intention of executing, subsequently, a formal lease with covenants, the agreement to lease is not a completed lease." *Dan Cohen Realty Co.* v. *National Savings & Trust Co.,* 125 F. 2d 288, 289 (C. C. A. 6, 1942).

Here, the Trustees wrote that they were "willing to lease" etc., and "If these terms are agreeable a formal lease can then be drawn up" (pp. 3-4, *supra*). Appellant's agent replied, "The terms of your offer are acceptable," referred to certain lands which it understood "will be included in the lands to be leased," and

concluded, "We will prepare a tentative form of lease for submission to you" (pp. 4-5, *supra*). Thus, there were no words of present demise; on the contrary, both parties spoke of the leasing in future terms, and execution of a formal lease was expressly contemplated. Since appellant was already in possession under its prior lease which still had more than three years to run, there was no need for a stop-gap lease in the form of correspondence until a formal instrument could be executed. In the ordinary course the parties would have expected to be able to settle all the terms and execute the new lease long before expiration of the old one.

In the light of the foregoing considerations, it is plain that the trial court was right in holding that the letters of October 18 and 21, 1940, did not constitute a lease.

II

The Correspondence Between Appellant's Agent and the Trustees of the Damon Estate Was Mere Negotiation and Not a Contract

Alternatively to its claim of a lease, appellant contends (Br. 9, 13-23) that the correspondence above referred to constituted an offer and acceptance, creating a binding contract to make a lease. That contention is equally unsound. The letter from the Trustees expressed a willingness to enter into negotiations which might result in a lease. Such a communication is not an offer to contract and cannot be "accepted". No matter how answered, it does not bind the putative lessor. This was the holding in *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation,* 20 F. 2d 67 (C. C. A. 6, 1927). The material facts of that case were indistinguishable from those at bar. There the lessor wrote that it "would be willing to make a lease to your company" of certain land at specified rentals, the lessee

to pay all taxes, concluding, "If this meets with your approval, Mr. W. O. Davis, our general counsel, on his return to this office, will draw up a lease for your signatures according to the above terms." The addressee replied that it "accepts offer as proposed in the letter aforesaid, and requests that your company draw up its customary lease as your company makes to other persons under similar circumstances." The district court held that there was neither a lease nor a binding contract for a lease. The appellate court affirmed, saying (pp. 69-70):

> * * * The offer must be one which is intended of itself to create contractual relations upon its acceptance. See 6 R. C. L. § 23, p. 600. The letter is not in form an offer. It merely says that the writer "would be willing to make a lease." Its last paragraph calls for a communication to the writer of an approval, and repels the idea that a contract would result by merely mailing an acceptance. It states that, after receipt of that approval, a lease would be drawn up and executed. It was clearly not intended to create contractual relations merely by mailing an acceptance.
>
> Furthermore, we think the letter, in view of the circumstances, indicates that the preparation and execution of the lease were necessary to the creation of a contract. The letter treats of only a few of the terms which would ordinarily be embodied in a mining lease. * * *
>
> * * * A written lease was contemplated as a final conclusion of the negotiations. The terms of the letter so indicate. As already said, it is not in form an offer to contract, but merely an expression of a willingness to make a lease. It calls for a previous expression of approval, without which no lease is to be prepared and executed. The subject-matter is of a nature to require a formal writing for its full expression. It is of that class which is usually put in writing. The letter treats of only a few of the terms of the usual lease. * * *

Numerous authorities to the same effect were cited by the court (20 F. 2d at p. 70), including the decision of this Court in *Northwestern Lumber Co.* v. *Grays Harbor & P. S. Ry. Co.,* 221 Fed. 807 (1915); and *Hackley* v. *Oakford,* 98 Fed. 781 (C. C. A. 3, 1899), certiorari denied 177 U. S. 694.

Moreover, it is apparent that the parties themselves understood they were merely negotiating for a lease. A comparison with the numerous provisions of the prior lease (R. 1516-1533) and the tentative draft for the new lease submitted by appellant (R. 1568-1577) makes plain that the letters of October 1940 contained only a few of the material terms that the parties would incorporate into any such lease. For example, no reference was made to rights of way for the lessee (cf. R. 1526-1527, 1569-1570), manner of payment of rent (cf. R. 1528, 1571-1572), holding over to harvest maturing crops (cf. R. 1528, 1570), payment of special assessments and benefit charges (cf. R. 1529-1530, 1573-1574), fencing and liability for damage by straying cattle of the lessor or its other tenants (cf. R. 1530, 1574), exercise by the lessee of rights over other parts of the Ahupuaa of Moanalua (cf. R. 1531, 1575, 1583), maintenance of improvements (cf. R. 1531, 1575), removal of buildings and machinery by the tenant on termination of the lease (cf. R. 1532, 1576, 1583), or right of the tenant to withdraw from parts of the area leased (cf. R. 1574, 1583). As to some of these, the parties proved to be in material disagreement (R. 1583).

It is unlikely, to say the least, that the parties intended to commit themselves to an arrangement that left so much in doubt. As the court said in *Locomobile Co. of America* v. *Bergdoll,* 192 Fed. 447, 448 (C. C. E. D. Pa. 1912), "If the writings in evidence were intended to contain the whole contract, the parties were inevitably beginning a series of lawsuits, and it can

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It is unlikely, to say the least, that the parties intended to commit themselves to an arrangement that left so much in doubt. As the court said in *Locomobile Co. of America* v. *Bergdoll,* 192 Fed. 447, 448 (C. C. E. D. Pa. 1912), "If the writings in evidence were intended to contain the whole contract, the parties were inevitably beginning a series of lawsuits, and it can

hardly be supposed that two thoroughly competent businessmen could have failed to know that many other matters must be discussed and agreed upon before their preliminary understanding could possibly be carried out."

There is nothing to the contrary in *Wong Kwai* v. *Dominis,* 13 Hawaii 471 (1901), relied on by appellant (Br. 12; cf. R. 499-500). There, as the decision put it, the lessor's agent "wrote definitely as one having complete authority, stating that the plaintiff, if he agreed, should have the lease on such and such terms" (13 Hawaii, p. 476). Nevertheless, the court said, "This is a case of unusual difficulty" (p. 474), and "The question of greatest difficulty is whether the letter should be construed as containing an offer" (p. 475). After examining all the circumstances and noting that the agent who wrote the letter had subsequently treated it as an offer and the acceptance as making a binding contract, the court concluded, "On the whole we are of the opinion that sufficient cause has not been shown for reversing the decree of the Circuit Judge" (p. 478). The decision seems to mark the limit of how far the Hawaiian court would go in sustaining a finding that such a contract to lease was intended by the parties. It provides no reason for reversing the present judgment, where the Trustees' letter was far less specific and their subsequent conduct was inconsistent with a view that they had made an offer capable of being accepted so as to make a binding contract. Cf. *Northwestern Lumber Co.* v. *Grays Harbor & P. S. Ry. Co.,* 221 Fed. 807, 814 (C. C. A. 9, 1915).

Finally, whatever view is taken of the Trustees' letter, no contract in fact resulted, because the reply by appellant's agent did not conform to the terms thereof. The Trustees wrote, "Land to be leased comprising fields now in cane mauka of Kamehameha Highway and

makai of the Highway fields 92 to 94 inclusive. (We understand fields 95 and 96 are going to be taken over by the U. S. Army.)" (R. 1513.) C. Brewer & Co. replied, "We understand that unless Fields 95 and 96, makai of Kamehameha Highway, are taken over by some Federal authority before the expiration of the current lease, they will be included in the lands to be leased to Honolulu Plantation Company" (R. 1515-1516). However, the Trustees had certainly not offered to lease fields 95 and 96. Their statement regarding those fields was at the most an explanation of why they were *not* being offered. In undertaking to increase the area covered by the negotiations, C. Brewer & Co. introduced a new provision, which prevented their letter from operating as an acceptance. *Iselin* v. *United States,* 271 U. S. 136, 139 (1926); *Title Insurance & Guaranty Co.* v. *Hart,* 160 F. 2d 961, 963, 966 (C. C. A. 9, 1947); *Machine Tool & Equip. Corp.* v. *Reconstruction Fi. Corp.,* 131 F. 2d 547, 556 (C. C. A. 9, 1942); *Richards* v. *Ontai,* 19 Hawaii 451, 456-457 (1909).

Since it thus appears that the Trustees' letter was not an offer, and the reply to it was not an acceptance, it is obvious that no binding contract resulted from them.

III

As to Appellant, Condemnation of the Damon Estate Lands Was at Most a Frustration Rather Than a Taking

Appellant argues (Br. 13-23) that if the correspondence with the Trustees of the Damon Estate constituted a contract to lease, rather than an executed lease, still that contract would give it such an interest in the land as to entitle it to claim severance damages on account of the condemnation. Again, appellant's conclusion is unsound.

Even if the supposed contract to enter into a lease were executed and legally binding, still it was silent as

to so many material terms of the proposed lease that it could not have been specifically enforced (cf. p. 13, *supra*), and the only remedy for breach would have been an action at law for damages. Cf. *Gulbenkian* v. *Gulbenkian,* 147 F. 2d 173, 175 (C. C. A. 2, 1945). The rule that the holder of a contract to purchase land has an equitable interest in the land, and related equitable principles, "are only incidents or necessary consequences of the right to specific performance." *National Bank of Kentucky* v. *Louisville Trust Co.,* 67 F. 2d 97, 100 (C. C. A. 6, 1933), certiorari denied 291 U. S. 665. Lacking the right to specific performance, appellant could have had at most only a right *in personam* against the Trustees of the Damon Estate, not an interest in the land itself. Cf. *Sutton* v. *Commissioner of Internal Revenue,* 95 F. 2d 845, 849 (C. C. A. 10, 1938). Mere frustration of a contract to purchase, by condemnation of the subject matter, is not a taking of property of the prospective purchaser and does not entitle him to compensation in the condemnation proceeding. *Omnia Co.* v. *United States,* 261 U. S. 502 (1923).

IV

Appellant Did Not Establish That Condemnation of These Lands Diminished the Market Value of the Remainder of Its Plantation

Since the only claim here made by appellant is for severance damages to the remainder of its plantation (R. 509), it would not have been enough for appellant to show that it had an interest in the 595.01 acres condemned. To recover severance damages, appellant needed also to show that the market value of its remaining property was diminished by the taking of its interest in the 595.01 acres. See *United States* v. *Miller,* 317 U. S. 369, 376 (1943), and cases there cited. That appellant failed to do. The trial court, giving appel-

lant the benefit of every doubt as to its legal rights, still held that it had not proved its case. It held (R. 502-503):

> At best, having remained in possession after December 31, 1943, and thereafter having paid the yearly rent called for by the October 1940 contract, the Company had a year to year tenancy, with a right to sue for specific performance. An estate in that indefinite condition, involving the purchase of a lawsuit, would not be attractive to a buyer.
>
> For these reasons, I do not believe that the Company had an estate in the Damon lands which supports its claim for severance damage with respect thereto at the rate of $1,000 per acre.

The trial court's conclusion in this regard rests on its evaluation of the evidence, not ordinarily subject to review on appeal. However, it may be observed that no different conclusion could reasonably have been reached. Appellant's claim is that it suffered severance damages from the taking of this land at the rate of $1,000.00 for each acre taken, the same rate as was claimed for the taking of lands as to which its legal status as lessee was unquestioned. The trial judge was obviously right in holding that the loss of a dubious right, enforceable only by litigation if at all, could not be as damaging as the loss of clearly established rights. He therefore rejected, as to the 595.01 acres, the uniform figure of $1,000.00 per acre taken, advanced by appellant. Since there was no evidence as to any lesser amount of damage (cf. R. 503), appellant's case necessarily failed for lack of any credible evidence to sustain its burden of proving the damage claimed. See *United States* v. *Katz Drug Co.*, 150 F. 2d 681, 686 (C. C. A. 8, 1945); *United States* v. *Harrell*, 133 F. 2d 504, 507-508 (C. C. A. 8, 1943); *United States* v. *711.57 Acres of L. in Eden Tp., Alameda County, Cal.*, 51 F. Supp. 30, 33

(N. D. Cal. 1943), appeal dismissed by stipulation 144 F. 2d 355 (C. C. A. 9, 1944).

Wholly aside from any of the matters above discussed, the reasons advanced by the United States, in its opening brief on its own appeal, for reversing the award of such severance damages as were allowed to appellant, are of course equally applicable to defeat the claim for further severance damages which appellant makes here.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be affirmed in so far as it denies to appellant severance damages on account of the taking of the 595.01 acres of land owned by the Damon Estate.

Respectfully,

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